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THE JURY AND ITS DEVELOPMENT.

III.

THERE was certainly one sort of trial in which witnesses were publicly examined before the jurors at an early period; and this may well have been a provocation to the same thing in the regular jury trial. I mean the case of challenges to the jurors. The "triors," generally two of the unchallenged jurors, might question the challenged men on oath, and might be sworn and charged to say whether these were telling the truth. We see this in the hard-fought case of Wike *v.* Gernon, reported as of 1371–1375.[1] There had been a struggle over empanelling the jurors, involving questions about taking an unequal number from two counties, and about challenges to jurors as being in the service of a party, and as having given their verdict beforehand[2] by telling their opinion, and as otherwise bad. The reporter adds, "And yet the persons who were challenged were sworn to give evi-

[1] Lib. Ass. 301, 12; s. c. ib. 304, 5; 315, 1; 315, 5; Y. B. 48 Edw. III. 30, 17. An assise of novel disseisin. The parties were at issue as to whose son the defendant was, Alice G.'s or Alice W.'s; and there was a great debate over the question of what jury should try the question, a jury from Essex, where the defendant said he was born, or from Lincoln, where the land was. It was finally determined to take it from both counties. The jury were out three days before agreeing, and when they came to give their verdict all went for nothing by the plaintiff's becoming nonsuit. In 1382 Belknap, C. J., who had been of counsel with the plaintiffs here, asserted emphatically this power of becoming nonsuit *a chesc. temps avant plein verdict dit.* Bellewe, 251, 2.

[2] *Adevant main!* and so often. Had the statute of 1362 (36 Edw. III. c. 15), requiring the pleading to be in English, hurt, just a little, the purity of the reporter's French?

dence to the jurors [*i.e.*, those jurors who were trying the challenges]; and so it may be where the challenge sounds not in their reproach or dishonor. But where the challenge was for taking money of the party, it was determined by the triors, without having evidence, by their oath." In 1401 (Y. B. 3 H. IV. 4, 18), a juror was challenged as not having enough freehold, and at the request of the triors he was sworn to tell the value of his freehold, and he said five shillings; "and then the triors were charged on the question whether he told the truth, and they said that he was sufficient." While this sort of thing was going on it seems probable that a similar examination of witnesses may have been allowed, sometimes, at the trial of the case.

We have already noticed in the case of 1353 (*ante*, p. 318) that a witness was sworn to inform the jury of accusation. The same thing is seen again in 1406,[1] where, in conspiracy, against the bailiff of Savoy and an accusing jury, the former sets up that he was instructed by the Marshal's Court to attend the jurors and tell them what he knew, and was compelled to swear and inform them. Such a proceeding as this, however, might well be allowed, in an *ex parte* inquisition, by special order of a court, without its being recognized as the right of a party in a civil suit. But in 1433 (Y. B. 11 H. VI. 41, 36), we find something more distinct and instructive, something which indicates that it was by this time a well-known thing to testify publicly to the jury, and which shows, also, the grave perils that attended this act, and helps us to understand the slow development of the practice and the slight indications of it that we find thus far. A writ of maintenance was brought in the King's Bench against one B, charging that in an assise of rent between the plaintiff and C the defendant had "maintained" C. B answered that long before C had anything in the said rent he himself owned it, and he had granted it to C. When the said assise was brought against C the latter came to B, the present defendant, and asked him to come to the assises with him and bring his evidences relating to the rent; and accordingly B came with these and delivered to C certain ancient evidences to plead in bar against the plaintiff in discharge of his warranty of the rent; this was all the maintenance. In discussing whether this really constituted maintenance, and if so whether it was justifiable, it was insisted that the defendant should

[1] Y. B. 9 H. IV. 9, 24; s. c. 8 ib. 6, 9.

not have come voluntarily, but only by way of voucher to warranty. There was some difference of opinion among the judges, and the case was adjourned without a decision.[1] But the judges said certain interesting things. Hals, J., said, "In a tort of maintenance it is a good plea to say that he who is charged came and prayed us, since we were an old man of the region and had knowledge of the title of the land of which he was impleaded, that we would be with him to inform the jury about the title; and so we did, &c. So here it is good. Cheyne [C.J.] It will be adjudged a maintenance in your cases, because he has no cause or privity for maintaining the controversy more than the merest stranger in the world unless the other had cause of warranty against him. And as to what you say of its being a good plea in maintenance that he is an old man of the region, and having better knowledge of the right and title of this rent, and his coming with the defendant to declare his right in the said rent &c., I say that this is a real maintenance; for on such a ground everybody could justify a maintenance, and that would be against reason. But if he had shown a ground of the maintenance on which the law presumes him bound to be with the party, then this would not be adjudged a maintenance,—as if he were with his relation (*cosin*), or came with one because he was his servent or his tenant. He is bound to be with his servant or tenant; but it is not so in other cases."[2] The perils of an ordinary witness are further illustrated in a case of 1450 (Y. B. 28 H. VI. 6, 1), in which it was sought to hold certain persons sworn on an inquest, in an action for maintenance. Littleton (counsel) said, "What a man does by compulsion of law cannot be called maintenance; as where a juror passes for me and against you, &c." Fortescue. C.J., agrees to this, and adds, "If a man be at the bar and say to the court that he is for the defendant, that he knows the truth of the issue and prays that he may be examined by the court to tell the truth to the jury, and the court asks him to tell it, and at the request of the court he says what he can in the matter, it is justifiable maintenance. But if he had come to the bar out of his own head (*de son test demesne*) and spoken for one or the other, it is maintenance and he will be punished for it. And if the jurors come to a man where

[1] Brooke, Ab. Mayntenance, 51, says, "*et fuit in maner agree que il est bon barre.*"

[2] And so (1442–3) in the case of Pomeray *v.* Abbot of Selby, Y. B. 21 H. VI. 15, 30; s. c. 22 ib. 5, 7.

he lives, in the country, to have knowledge of the truth of the matter and he informs them, it is justifiable; but if he comes to the jurors or labors to inform them of the truth, it is maintenance, and he will be punished for it;" so Fortescue said, and it was admitted by the court.[1]

It is then abundantly plain that by this time witnesses could testify in open court to the jury. That this was by no means freely done seems also plain. Furthermore, it is pretty certain that this feature of a jury trial, in our day so conspicuous and indispensable, was then but little considered and of small importance. We see this in the valuable and very interesting book of Fortescue, "*De Laudibus Legum Angliæ*," written in Latin, not long, probably, before 1470. Fortescue had been Chief Justice of the King's Bench from 1442–1460; after being in exile with the queen and son of Henry VI., he returned to England, and was alive as late as 1476, — dying, it is said, at the age of ninety. In this book, which is written in the form of a dialogue between the Prince of Wales in exile and "a certain grave old knight, his father's Chancellor, at that time in banishment with him," the excellence of English laws is set forth, as compared with the "civil law," *i.e.*, the law of other European countries, founded on the Roman system. The first point in this comparison is the method of determining controversies of fact; more than a quarter of the book is taken up with showing how much better, in this respect, the English system is than that of the continent, where two witnesses are enough: "Slender, indeed, in resource must he be thought, and of less industry, who out of all the men he knows cannot find two so void of conscience and truth as to be willing for fear, favor or advantage to go counter to the truth in anything. . . . Who then can live secure in property or person under law like this, giving such aid to any one who would harm him." (c. 21). Under that system (c. 23), justice constantly fails from the death or failure of witnesses. In England, on the other hand (cc. 25, 26), the witnesses must be twelve; they are chosen by a public official of high

[1] The doctrine of maintenance seems to have scared witnesses in Chancery. It is to the period 1450–60 that a petition belongs (Calendars of the Proceedings in Chancery, 1, p. xix.) in which a plaintiff asks the Chancellor to issue a subpœna to a certain witness to appear and declare the truth, setting forth that the "same Davyd will gladly knawelygge the treweth of the same matiers, bot he wald have a maundement fro yowe for the cause that he shuld noght be haldyn parciall in the same matier."

standing, acting under oath, from among persons of the neighborhood where the matter in question is supposed to exist or take place, men of property, indifferent between the parties, subject to challenge by both, acting under oath. They are informed of the controversy by the court, and the parties or their counsel, and their witnesses, and confer together afterwards privately and with deliberation, and return and give their answer publicly in court.[1] After this verdict, an aggrieved party, by the writ of attaint, through the oath of twenty-four men of much better estate than the twelve, may convict the latter of a false oath, and subject them to the severest punishment. And then (c. 26), Fortescue sums up: "Here no one's cause or right fails by the death or failure of witnesses. No unknown witnesses are produced here, no paid persons, paupers, strangers, untrustworthy or those whose condition or hostility is unknown. These witnesses (*isti testes*) are neighbors, able to live out of their own property, of good name and unsullied reputation, not brought into court by a party, but chosen by an official who is a gentleman and indifferent, and required (*compulsi*) to come before the judge. These (*isti*) men know everything which the witnesses can depose; these (*isti*) are aware of the trustworthiness or untrustworthiness, and the reputation of the witnesses who are produced."

In this account it is obvious how great a figure that old quality of the jury still plays, which made them witnesses; it is the chief thing. The point of all this elaborate contrast is the greater number and better quality of the English witnesses, and the greater security there is in the impartial methods of procuring them. While they may be informed by other witnesses, produced by either party, yet they know already what is to be told them.

[1] Fortescue's statement of the mode of proceeding at the trial is too interesting to be omitted: "The whole record and process will be read to them [the twelve] by the Court, and the issue upon which they are to certify the Court will be clearly explained to them. Then each party, personally or by his counsel, in the presence of the Court, will state and show to the jurors all the matters and evidences which he thinks can instruct them as to the truth of the issue thus pleaded. And then each may introduce before the justices and jurors all the witnesses that he wishes to produce on his side, who, being charged by the justices on the holy evangelists of God, shall testify all that they know bearing upon the matter of fact (*probantia veritatem facti*) which is in controversy. If need be, these witnesses (*testes hujusmodi*) may be separated until they shall have deposed what they will, so that the saying of one shall not inform another, or stir him to the giving of like testimony." Thereupon the jurors go out and deliberate.

One remarks the small place that these informing witnesses have in the picture. The point of view here referred to clearly appears in what follows. By and by the prince is wholly satisfied of the excellence of the English law, one scruple only remaining. The Scriptures say that "the testimony of two men is true," and "bring with you one or two, so that in the mouth of two or three every word be established." If the Lord says two or three, why require more? No one can get any better or other foundation than the Lord has set. This is what troubles me a little, — *hec sunt, Cancellarie, que aliquantulum me conturbant.* The Chancellor is ready with his answer: If the testimony of two is true, *a fortiori* that of twelve should be thought true; according to the rule, *Plus semper in se continet quod est minus.* All that the Scriptures mean, he goes on, is that not less than two shall serve. "In no case can this mode of proceeding fail for lack of witnesses; nor can the testimony of witnesses, if there be any, fail of its due effect, etc."

Almost contemporaneous with Fortescue's book is the case of Babington *v.* Venor, in 1465,[1] in which, for the first time in the Year Books, we have something like a full report of the arguments and the putting in of the case before the jury. It was an assise of novel disseisin. Littleton for the plaintiff "shows in evidence" for the plaintiff a long story. Towards the end of it he says as to one point, "a man is here at the bar, an esquire, who spoke with her, &c. . . . and he will declare it. And also here is the general attorney of the Lord [Bishop] of W., who says in his Lord's name that, etc." There is nothing to show that either of these witnesses was actually put on. "Then Yong, for the defendant, shows evidence to the assise," — going on with another long story; and then, "The defendant's farmer is here at the bar ready to show to the Court (*al Court*) how, etc. . . and this will the farmer declare to you, and also the rent-collector." Then he shows certain documents, nothing being said of any examination of witnesses as yet. Then Catesby, for the plaintiff, makes counter statements, *e.g.*, how the plaintiff entered, in the presence of several men here at the bar, etc., etc.; and he concludes by praying that the farmer may be examined. "The farmer came into Court and was sworn on a book to tell the truth to the Court as to that on which he should be examined; and he was examined by the court. . . .

[1] Long Quint (Edw. IV.) 58; s. c. Y. B. 5 Edw. IV. 5, 24. *Ante*, 316–17.

and he shows, etc. . . . And the rent-collector was also examined on a book as to this," etc.[1] Then Guy Fairfax, counsel for the plaintiff, tells another story as to what took place at the view. Then came some discussion on points of law. Then the judges suggested to the defendant's counsel that if they wished to rest upon the plaintiff's evidence not denied by them, they might discharge the inquest and demur upon the evidence; or if they were willing to run the risk of what the jury would say, the evidence might stand just as it was. The defendants preferred to go to the jury. Then came a discussion over a point of law, and then the charge: "Sirs, you have had much evidence from both parties. Do in this matter as God will give you grace and according to the evidence and your conscience. You will not be compelled to say, precisely, disseisin or the contrary, but you may find the fact, *i.e.*, the special matter, so as to give a special verdict on that and pray the judgment of the Court. And so go together, etc." The jury found for the plaintiff.

In passing from this matter of the ways of informing the jury, it must be remembered that although we have now reached modern methods, we are very far indeed from having reached the modern conception of trial by jury. Look, for instance, at Coke's ideas, a century and a half later, when he is explaining certain statutes as to treason and perjury (3 Inst. 26–7; *ib.* 163). The statutes of 1 Edw. VI. c. 12 and 5 & 6 *ib.* c. 11, had required two accusers (*i.e.*, witnesses), in order to a conviction of treason. And then a statute of 1 & 2 Ph. & M., c. 10, had enacted that all trials for treason should thereafter be "had and tried only according to the due course and order of the common law." Coke says that this last statute does not repeal the others, for it "extends only to trials by the verdict of twelve men *de vicineto*, of the place where the offense is alleged; and the . . . evidence of witnesses to the jury is no part of the trial, for by law the trial in that case is not by witnesses but by the verdict of twelve men; and so a manifest diversity between the evidence to a jury and a trial by

[1] One observes that only the defendant's farmer and rent-collector seem to have testified; all others are merely ready at the bar. Did the doctrine of maintenance operate to make it necessary for those having no special relation to a party to wait until the court or jury asked for them? This method may well have been favored as a rule of practice, from an unwillingness of the court to lengthen trials, — the statements of counsel as to what his witness had to say, accompanied by the production of these, serving in great part as a method of putting in evidence.

jury." "Albeit by the common law trials of matters of fact are by the verdict of twelve men, etc., and deposition of witnesses is but evidence to them, yet, for that most commonly juries are led by deposition of witnesses," etc. For an instance of a trial by witnesses, expressly contrasted with trial by twelve men, see the St. 5 & 6 Edw. VI. c. 4, s. 3, where, *inter alia*, one who should strike another with a weapon in a church or churchyard should lose an ear, or if he "have none eares," be branded, — if convicted by the verdict of twelve men, or by his own confession, *or by two lawful witnesses.*

4. As to the mode of controlling the jury and correcting their errors.

We have seen how the ways of adding to their knowledge were gradually increased, until at last witnesses called in by the parties were regularly admitted to testify publicly to these other witnesses, summoned by the viscount, whom we call the jury. This mounting witnesses upon witnesses was a remarkable result and teemed with great consequences. The contrast between the functions of these two classes became always greater and more marked. The peculiar function of the jury — as being triers — grew to be their chief, and finally, as centuries passed, their only one ; while that of the other witnesses was more and more defined, refined upon, and hedged about with rules. It is surprising to see how slowly these results came about. The attaint, which long held its place as the only way of remedying a false verdict, proceeded on the theory that the first jury had wilfully falsified, and so was punishable. An independent, original knowledge of the facts was attributed to the jury, and not an inferential and reasoned knowledge. So long as this theory was true and was really a controlling feature of a trial by jury, witnesses must needs play a very subordinate part. They were not necessary in any case. When they appeared the jury could disregard all they said ; and should, if it were not accordant with what they knew. Gradually it was recognized that while the jury might not be bound by the testimony, yet they had a right to believe it, and that they were the only ones to judge of its credibility. It became, then, the chief question whether they had such evidence before them as justified their verdict. If they had, they were not punishable ; if they had not, why punish

them for what perhaps they did not know? And so the attaint jury was not allowed to have more or other evidence making against the first jury's verdict than what that jury had had before them. But if they might believe what was thus testified to them it was equally true that they might disbelieve it, or a part of it; and an attainting jury must find it hard to say that it was a wilful falsehood, to go against a mass of evidence which *admitted* of being thought only partly true, or of being wholly disbelieved. The attaint grew unworkable. For one reason or another people were unwilling to resort to it, and jurors of attaint were unwilling to find the former jury guilty. In 1451 the inhabitants of Swaffham asked Parliament to annul a verdict and judgment in novel disseisin, alleging perjury in the jurors by reason of "menaces," and setting forth that the said inhabitants, for pity and remorse of their consciences, were loth to use a writ of attaint, since "the said assise durst not, for dread of the horrible menaces of the said Sir Thomas, otherwise do but be foresworn in giving their verdict in the same assise." [1] In 1565 Sir Thomas Smith [2] tells us: "Attaints be very seldom put in use, partly because the gentlemen will not meet to slander and deface the honest yeomen, their neighbors; so that of a long time they had rather pay a mean fine than to appear and make enquest. . . . And if the gentlemen do appear, gladlier they will confirm the first sentence, for the cause which I have said, than go against it." The Star Chamber was resorted to for the purpose of supplying the defects of the attaint and securing punishment for jurors who gave false or corrupt verdicts. The judges of the common law courts went a certain way in the same direction of fining and imprisoning jurors who went against the evidence. Of this I shall speak later. It is enough here to quote what Hudson says in his Treatise on the Star Chamber, written in the early part of the seventeenth century.[3] He is claiming for this court a very ancient jurisdiction; and after speaking of Henry IV. he adds: "When a corrupt jury had given an injurious verdict, if there had been no remedy but to attaint them by another jury, the wronged party would have had small remedy, as it is manifested by common experience, no jury having for many years attainted a former."

[1] Draft of a petition from the town Swaffham, "Paston Letters" (Gairdner's ed.), No. 151.

[2] Com. of Engl., Bk. 3 c. 2.

[3] Collectanea Juridica, ii. Hudson was not living in 1635.

In time courts adopted the method of granting new trials when the verdict was unreasonable, without punishing the jurors. A step had then been taken which made it important that the court should know, so far as possible, all that the jury knew; and accordingly the old doctrine of their going on private knowledge began more and more to give way. The jury were told that if any of them knew anything relating to the case, they ought to state it publicly in court. This lay long in the shape of a moral duty of the jurors, not enforceable; but after a time it was enforced, and the court assumed that, in general, nothing was known to the jury except what was publicly stated in court, adding to this (under the notion of judicial notice) what was known to everybody. This brought matters down to the state under which we are now living. The jury now had a duty to know nothing but what was publicly known and stated in court. They became merely judges upon evidence.

(*a.*) But let us turn back, and trace the working out of these results. For centuries the great check upon the jury was the attaint, *i.e.*, a proceeding in which the original parties and also the first jury were parties, and where a larger jury, made up of knights or other more considerable persons than the first, passed again on the same issue. If they found contrary to the first finding, then the first jury was convicted of perjury and heavily punished; and the first judgment was reversed. We see in one of our earliest cases[1] the punishment of a jury who, by confession of their leader and others, were adjudged to have perjured themselves, and also a reversal of the first judgment. It is probable that this consequence of punishment generally attended the proof of "perjury" in the use of the inquisition. But it is not probable that in the older law a reversal of the judgment would always follow. In Glanville there is no mention of the attaint, even as regards the possessory assises,[2] yet he says conspicuously that in the ordinance establishing the great assise, provision is made (*eleganter inserta*) for the punishment of those who swear falsely.[3] But there seems

[1] Gundulf *v.* Pichot (1072-1082), Big. Pl. A. N. 34; s. c. *ante*, p. 253.

[2] Brunner (Schw. 422, note) remarks this.

[3] *Pena antem in hac assisa temere jurantium ordinaria est et ipsi regali institutioni eleganter inserta.* Glanv. II. 19. He goes on to say that if the jurors are convicted of perjury (*perjurasse*) or confess, they lose all chattels and movables to the king, are imprisoned for at least a year, and that henceforth, losing their *legem*, they shall incur perpetual infamy. The point of the *eleganter inserta* seems to be intimated when it

always to have been the same finality in the procedure by the grand assise as in the duel: *Ea enim que in curia . . . per duellum semel fuerint terminata negotia perpetuam habent firmitatem.* Glanv. II. 3. And so in the earliest extant Year Book, in 1292 (20 Edw. I. 18), the reporter has a memorandum, "Note: After the great assise an attaint never lies." The attaint (*convictio*) seems to have originated in England, but is not traceable to any extant legislation. Whether it may have been a part of the ordinances of Henry II. establishing the recognitions, or whether it developed from the *pena* mentioned by Glanville in speaking of the great assise, or whether it was granted in the discretion of the king and his justices, seems not to be ascertained. This at least is true, that while it is not in Glanville, and while the first express mention of it in legislation appears to have been in 1268, we find it in the judicial records as early as 1202, and it is fully discussed in Bracton half a century later.

On the other side of the channel, they had punishment for jurors who swore falsely. Brunner cites an undated capitulary of the eighth or ninth century (Schw. 89) which shows this. But the attaint went beyond this; it was a procedure which also secured the reversal of the previous verdict, as a proceeding for error in law secured the reversal of a judge's decision. This, we are told, was a thing unknown in Normandy. As regards the *stabilia*, the petitory action corresponding to the writ of right, Brunner quotes a Norman case of 1248, in which the jury by mistake gave a verdict in favor of one William, and the court gave judgment accordingly; whereupon the jury came back with the information: *Quod non bene dixerunt, quia Robertus maius ius habebat in terra illa quam W.* The court, however, would not change their judgment; William kept the land, and the jurymen had to pay Robert the value of it.[1] The same rule applied in other recognitions. Brunner cites

is added that this punishment is rightly imposed, in order that all who put forward a false oath in this sort of case — whether champion (Glanv. II. 3) or juryman — may suffer a like punishment.

[1] Schw. 371. It would have been strange if this rigor had not existed in early days, when form bound every man by the exact words he uttered in court. This subject is illustrated in Brunner's essay on "Word and Form," in the old French procedure, published in the Proceedings of the Imperial Academy of Vienna, Vol. 77. A translation of this may be found in the "*Revue Critique de Legislation et de Jurisprudence*," (New Series), Vol. 1. Of the formalism of the old law many traces yet remain, such as the necessity for using specific words in criminal pleading. One sees an authentic bit of it in 1284 in the Statutes of Wales, c. VIII. (St. Realm, i. 64), where it is said of certain

a record of about the year 1200, in which a litigant in Normandy gives the king (John) twenty besants that a recognition upon a recognition be not made in a certain case, *injuste et contra consuetudinem Normanniæ.* In England the continental rule held as regards the writ of right; in this the great assise ended the controversy as absolutely as the duel which it displaced. Whatever is settled in the King's Court by the duel, says Glanville (lib. ii. c. 3), is settled forever. And again (ii. c. 6), where a matter is settled by the great assise, *tam finaliter quam per duellum terminabitur negotium.* Yet, none the less, even here, as we have seen, was a punishment provided for perjury by the assise jury — that *pena eleganter inserta* already mentioned.

In 1227 (Br. N. B. ii., case 262) a certain prior had lost, in a writ of right of an advowson, — the great assise finding for the defendant, *quia non viderunt quod idem prior* or any of his predecessors presented a clerk at the church in question. Thereupon the prior came, alleged that there was a false oath, and put forward half a dozen charters which seemed to prove it. The defendant, relying on the finality of the former trial, simply declined to answer and demanded judgment. Yet the case seems to have been thought doubtful, for it was postponed, to give time for a conference with the king and with other justices. The prior did not appear at the day given, and the defendant had judgment. This seems to have been an irregular attempt at attainting the jurors of the great assise; for these jurors appear to have been summoned, and at the postponement the order was *et juratores sine die donec aliud audiverint.* The annotator also remarks upon the margin: "Note, that not easily may the jurors in the great assise be attainted": *Nota, quod juratores in magna assisa non poterunt convinci de facili.* In his treatise Bracton (290–290*b*) says that in all assises, except the grand assise, the *convictio* (attaint) lies; and for this exception he gives the very inadequate reason that the tenant has consented to the grand assise and cannot go back upon his own proof. The true reason appears to be merely that in this case the old law had not been changed.

real actions, that the demandant shall count in words that express the truth, without being subject to any challenge on account of words, — *sine calumpnia verborum, non observata illa dura consuetudine, qui cadit a sillaba cadit a tota causa.* See also the rigor which was customary before the statutes of jeofail, as indicated by Stat. 14 Edw. 3, c. 6. The curious discussions over this statute, in Y. B. 40 Edw. III. 34, 18, and 11 H. IV. 70, 4, are worth remarking.

The origin of the attaint in the possessory recognitions, is attributed by Brunner, reasonably enough, to the mere favor of the king (Schw. 372), and he refers to a case of 1347 or 1348,[1] in which a disappointed suitor offers the king twenty shillings for an attaint jury. Other early cases point the same way. The earliest one, so far as I observe, was in 1202 (Seld. Soc. Pub. iii., case 216), and there the defeated party offers the king forty shillings for a jury of twenty-four knights. In the same year (*ib.*, case 224), a like offer of twenty shillings is made.[2]

(*b.*) Not merely were the jurors punished for a false verdict, and this and any judgment upon it reversed: the judges also were punished for errors in law and their judgments reversed. The judges, according to the very old law, had to defend their judgment by the duel. The same ideas survive in our early records. In 1231 (Br. N. B. ii. 564), certain special justices who had taken an assise of mortdancestor between Oliver as demandant and William, a prior, as tenant, were summoned at the complaint of the tenant to record the proceedings, and the jurors to certify their verdict. The justices say that the jury found that Roger, a brother of Oliver, died seised of the land, and that Oliver was next heir, and so judgment was given for Oliver. The jurors were asked if this was the record. While admitting it in part, they said that Oliver had an older brother, Ralph, who was living, and therefore they had doubted whether Oliver was the nearest heir, and they set forth a former litigation as explaining their doubt. Oliver was then asked if this were so, and did not deny it. The justices, however, did deny it at first; but afterwards they admitted that the jurors said that Oliver had an older brother. Now, under these circumstances, according to a doctrine set forth by Glanville (vii, c. 1), while the younger

[1] Pl. Ab. 124, col. 2; cited by him from Biener, Eng. Geschw. i. 72.

[2] An attaint jury in 1203 is found in the same volume, case 150. Other early cases are in the Note Book; and several later ones in the Placitorum Abbreviatio, of various dates, between 1247 and 1312. In some the first jury is vindicated; in others they are convicted and judgment given reversing the former verdict. In the Revised Glanville, alluded to by Professor Maitland in Seld. Soc. Pub. iv. 6, and more fully explained by him in an article which is soon to appear in this Review, occurs a passage which I venture to extract. A Writ of Attaint is given, and then the writer (speaking a little later than Bracton, and not far, as it is supposed, from the year 1265) says that this writ is never given without pay, unless, by favor, to a poor person. (*Et sciendum quod istud predictum, breue nunquam a Domino rege vel ejus justiciariis alicui conceditur sine dono, nisi de gracia, si sit pauper.*)

brother has a superior claim in a writ of right, yet he cannot maintain a mortdancestor, for the older brother, and not he, is the nearest heir. It was, therefore, wrong in the justices to give judgment for the younger brother. Accordingly it was now adjudged as follows; "Because the justices acknowledge that the jurors said that the said Oliver had an older brother named Ralph, and therein have absolved the jurors, and the justices adjudged that Oliver was the next heir on the ground that the said Ralph could not be *dominus et heres* whereas this (namely, being *dominus et heres*) has regard to *jus* and not to *possessio* or to the assise of mortdancestor, it is adjudged that the said justices erred in making that judgment, and made a false judgment; and therefore the justices are amerced, and the jurors go without day, and Oliver is amerced, and the prior recovers his seisin." [1]

(*c*.) It was sometimes found, in preparing to give judgment, that the verdict of the jury was obscure or incomplete; the judges below had not questioned them enough. In such cases they were resummoned to the court in banc *ad certificandum*. This was called the *certificatio*. One sees it in 1232 (Br. N. B. ii., case 887), and 1237 (*ib*. iii., case 1226). In 1290–1 (Pl. Ab. 284, col. 2, Suff.), one who had caused the jury to be resummoned for this purpose, being asked in what the jury had been insufficiently questioned or had spoken obscurely, answered by merely repeating their verdict, which he seems to say is wrong. His adversary replied that the verdict is not obscure, and for a plain verdict *non potest esse certificatio set pocius attincta*; and she asks judgment and has it.

(*d*). The attaint at first was but a limited remedy, given only in assises, but it grew by statute and by the discretion allowed to the judges. The first mention of it in the statutes is a mere mention in 1268 (St. Marlebridge, 52 H. III. c. 14), cutting down general exemptions from serving on "assises, juries and inquests," in cases where necessity requires the service, — as it may, said the

[1] In 1235–6 (Br. N. B. iii., case 1166), there is a complaint to the king of an error, committed by the justices at Westminster, in giving judgment too quickly against a defendant on default, "whereas many distraints should follow . . . before the said Thomas should have recovered on the default." The justices appeared and admitted the facts, but pleaded ignorance, *nesciverunt in dicto negocio melius procedere*. The judgment was reversed. There was no jury in this case, and nothing is said of any punishment of the judges; "but observe," says Maitland in his note (vol. iii. p. 179) "that proceedings in error are a complaint against the judges who have erred."

statute, in the great assise, or where the party is a witness to a deed, *aut in attinctis*, etc. In 1275 (St. West. I. 3 Edw. I. c. 38) it is recited that people lose their estates because some "doubt not to make a false oath;" and it is enacted that, on inquests in pleas of land or freehold or what touches freehold, the king, *de son office*, when it shall seem needful shall hereafter give attaints.[1] This statute is supposed to have extended the remedy beyond the case where the assise jury answered merely on the point of the assise, to that where it answered on incidental or newly developed questions, *in modum juratae*, and to all juries in real actions. In 1302 (Y. B. 30 and 31 Edw. I. 124) Berewik, J. calls on the assise in novel disseisin to tell him the damages, and warns them that there may be an attaint for damages as well as the principal matter, "and out of this Court, without the need of seeking it in the Chancery." This seems to rest on the statute of 1275; at common law, the rule is given by Bracton (290*b*), *de damnis nulla erit convictio sed . . . locum habet certificatio.*

The Mirror, early in the fourteenth century, wished attaints extended and made easier: "It is an abuse that attaints are not granted without difficulty in the Chancery to attaint all false jurors, as well in all other actions real, personal and mixed, as in assises" (c. 5, s. 1, 77). Before Horne's death[2] there came an instalment of this desired reform. In 1326–7 (St. 1 Edw. III. c. 6) after a recital of "great mischiefs, damages and destructions of divers persons, as well as of the men of holy church by the false oath of jurors in writs of trespass," the writ of attaint is allowed for the principal matter and also for damages in trespass, and the chancellor is to grant such writs *sanz parler au Roi.* In this fast-breeding action of trespass, the writ of attaint was further extended in 1331 (St. 5 Edw. III. c. 7), to cases where the

[1] "Not that the king shall grant these writs whenever applied for, *ex merito justitiae* [Coke's view, 2 Inst. 237], (a sense which the words *ex officio* surely never bore in any writer of Latin, whether good or bad), but that the king shall *ex officio*, without being sued and applied for, grant," &c. Reeves, Finl. ed. ii. 34. And so in 1292 (Y. B. 20 & 21, Edw. I. 110) Spigornel (counsel) says: "We understand, sir, that no attaint shall pass upon an inquest without the special order of the king;" and in 1294 (Y. B. 21 & 22, Edw. I. 330) the reporter has a note "that justices itinerant may grant attaints upon assises which pass before them, but not on inquests." Coke (2 Inst. 130) thinks that the attaint lay at common law in pleas both real and personal — a view which Reeves justly discredits (ii. 33).

[2] Which was in 1328. Black Book of the Adm. i. Introd. lix., note.

proceeding was informal and without writ, if the damages pass forty shillings; and then in 1354 (St. 28 Edw. III. c. 8) it was enacted that "the writ of attaint be granted without regard to the amount of damages, as well upon a bill of trespass as upon a writ of trespass." [1]

Earlier than this, in 1347 (Parl. Rolls ii. 167, 23), the commons had petitioned for the attaint in writs of debt and all other writs and bills where the demand or damage amounted to forty shillings, but the answer came, "Let the old law stand till the King be better advised." At last, in 1360 (St. 34 Edw. III. c. 7), came full relief in a statute providing, "against the falsehood of jurors, that every man against whom they shall pass may have the attaint both in pleas real and personal." [2] Later in the fourteenth century the benefit of the attaint was extended in other ways, *e. g.*, by giving it to a reversioner when the life tenant had lost.

(*e*) The attaint was now a general remedy, for litigants in the King's Courts, but it was found to be a very inadequate one. The next century is full of complaints, loud, bitter, and constant, of the wretched working of the jury and the attaint; perjury, bribery, and ruinous delays are set forth as inducing the increase of the property qualifications of jurors, and imposing new penalties upon them. Two remarkable statutes, of 1433 and 1436 respectively,[3] must be noticed. The first recites mischief, damage, and disherison from "the usual perjury of jurors," increasing by reason of gifts made them by the parties to suits, so that the greater part of people who have to sue (*quont a suer*) let go (*lessent*) their suits by reason of the said mischief and especially on account of the

[1] A "bill" was merely an informal document. In the "Paston Letters" the word is constantly used for a letter; *e.g.*, in No. 813 (1478) Sir John Paston's mistress writes that she is in good health "at the making of this sympyll byll," and asks for an answer by "the brynger of my byll." So in 1440–1 (Y. B. 19 H. VI. 50, 7), Paston J: If a bill be good in substance it is enough; *car un bill n'ad aucun forme.* In 1315 (Y. B. Edw. II. 277) a party had averred by Domesday Book, and a mandate was issued by Bereford, C. J., to the treasurer and barons of the exchequer, to certify as to the contents of Domesday. They would not certify, because the mandate was only *un bille* sealed with the seal of William de Bereford; whereupon the latter sent a writ (*brief*), and this brought an answer. Reeves, Hist. C. L. Finl. ed. ii. 97, note; ib. 99, note.

[2] The statute goes on: "And that the attaint be granted to the poor who shall *affier* that they have nothing wherefrom to pay therefor except their *countenance*, without payment (*fine*), and to all others by an easy payment."

[3] St. 11 H. VI. c. 4, and St. 15 ib. c. 5. For the corresponding petitions in Parliament and the answers, see Parl. Rolls, iv. 408, ib. 448 (47), and ib. 501 (26).

delays in writs of attaints. When the grand jury appears and is ready to pass, a tenant or defendant or one of the petty jury pleads false pleas not triable by the grand jury, and so delays proceedings until this be tried. When this is settled for the plaintiff, another pleads a like false plea since the last continuance; and so each of the defendants, tenants, or jurors, one after another, may plead and delay the grand jury; and, although all be false and feigned, the common law has no penalty. This has caused great vexation and travail to the grand juries, and plaintiffs have been so impoverished that they could not pursue their cases, and jurors are more emboldened to swear falsely. It is, therefore, ordained that plaintiffs may recover [against] all such tenants, jurors, and defendants the damages and costs thus suffered. The other statute, after reciting that by the law of the realm trials in matters of life and death and as to all sorts of questions, as regards matters of fact (*touchant matiers en fait*), are likely to be "by the oaths of inquests of twelve men;" that great, fearless, and shameless perjury horribly continues and increases daily among common jurors of the realm; that in proportion as men are more sufficient in land, the less likely they are to be corrupted; that in every attaint there must be thirteen defendants at least, unless some die, each of whom may have separate answer triable in any county, and the attaint may be delayed until all these are tried, and so delays to the plaintiffs in the said attaints for ten years *par commune estimation*,— goes on to provide for an increase of the property qualification of the attaint jurors, and that an adverse decision in any "foreign plea," [*i.e.*, one triable elsewhere than the issue in attaint] shall give the whole attaint against the one pleading it.

But not only was the machinery of the attaint jury cumbrous and well adapted to delays and frauds, but the attaint jurors were unwilling to find the petit jurors guilty, the punishment was so harsh. Now that witnesses were produced before a jury and they were expected to judge of the truth or falsity of the witnesses, things had changed. The essential nature of their own function as being something different from that of these new witnesses, something more than being mere testifiers to what they had seen and heard, as being always in a degree *judges*, drawing conclusions from what their senses presented and what others testified to them,— all this must have rapidly grown plain; and

so the extreme severity and unfitness of the punishment. The punishment mentioned by Glanville (lib. ii. c. 19) three centuries before continued to be applied in the attaint, and was even increased; the convicted juryman lost all his movable goods to the king; he was imprisoned for a year at least; he lost his *lex terrae* and became infamous. Bracton (292*b*) repeats this in substance, making their lands and chattels seized by the king until redeemed, and adds, "Never thereafter may they be received to an oath for they shall not afterwards be *othesworth*." It came also to be expressed as a part of the judgment that their wives and children should be turned out of doors, and their lands laid waste.

The wisdom of providing some milder punishment was seen. Accordingly in 1495 (St. 11 H. VII. c. 21) in providing the attaint for the first time, in the case of inquests in London, the punishment is limited to a fine of twenty pounds, "or more, by the discretion of the mayor or aldermen," imprisonment for six months or less, and "to be disabled forever to be sworn in any jury before any temporal judge." In the same year (*ib.* c. 24) there is a general statute which was afterwards continued several times, and then, having expired, was temporarily revived in 1531, by St. 23 H. VIII. c. 3, and finally made perpetual in 1571 by St. 13 Eliz. c. 25.[1] It continued in substance to be the law governing this matter until the abolition of attaints in 1825. This statute after the usual recital of continuing perjury [of jurors] and its mischiefs, provides that a party grieved by an untrue verdict, where the demand and verdict reach forty pounds shall have an attaint jury of the same number as heretofore. The petit jury shall (with certain exceptions) have no answer except that their verdict was true. If the issue be found against them they shall be fined twenty pounds, one-half for the king, the other for the party suing. They shall also "make fine and ransom by the discretion of the justices;" and they "shall never after be of any evidence, nor their oath accepted in any court." The party may plead any good bar to the attaint, but that is not to delay the trial of the petit jury's plea and issue. If the party's plea, whatever it be, is found against him, then the plaintiff in attaint is "to be restored to that he lost with his reasonable costs and dam-

[1] "Made in favor of the subjects, namely, for the qualification of the rigorous and terrible judgment of the common law in attaint," said the court in Austen *v.* Baker, Dyer 201*a* (1561).

ages." If the verdict be in a personal action and under forty pounds, the qualifications of the attaint jury are less, and the fine shall be only five pounds.

(*f.*) The statutes of Henry VII. however did not repeal the old common-law attaint. "So that," says Blackstone (Com. iii. 404), "a man may now bring an attaint either upon the statute or at common law, at his election, and in both of them reverse the former judgment." Either way the punishment was very severe; and it plainly appears that this, with other causes, was working fast to make the attaint wholly inoperative. I have referred to the "pyte and remorce of their concyencez" which kept the people of Swaffham, in 1451, from bringing a writ of attaint ("Paston Letters," No. 151); and to a part of what Sir Thomas Smith (Com. of England, Book iii. c. 2) said in 1565; "Attaints be very seldom put in use, partly because the gentlemen will not meet to slander and deface the honest yeomen, their neighbors, so that of a long time they had rather pay a mean fine than to appear and make the inquest. And in the meantime they will intreat, so much as in them lyeth, the parties to come to some composition and agreement among themselves; as lightly they do except either the corruption of the inquest be too evident, or the one party is too obstinate and headstrong. And, if the gentlemen do appear, gladlier they will confirm the first sentence for the causes which I have said than go against it." A century later, in 1665 (1 Keble, 864, 6), Hyde, C.J., "seeing the attaint is now fruitless," declared with vehemence in a civil case that jurors ought to be fined. And after another century, Blackstone said (Com. iii. 404), "I have observed very few instances of an attaint in our books later than the sixteenth century." "The writ of attaint," said Lord Mansfield in 1757,[1] "is now a mere sound in every case." In 1825 (St. 6 Geo. IV. c. 50, s. 60) it was at last enacted that in all cases attaints should "henceforth cease, become void and be utterly abolished."

A case or two will illustrate the working of the attaint in its decrepitude. In 1542,[2] more evidence for the plaintiff in attaint had in fact been given to the attaint jury than was given below; but this was held to be wrong, and Shelley, J. "admonished the jury to look to the evidence which was given to the first

[1] Bright *v.* Eynon, 1 Burr. p. 393.

[2] Rolfe *v.* Hampden, Dyer, 53*b*.

jury upon which they passed; for if they had pregnant and manifest proof and evidence to confirm the matter, although that were in fact false and the truth of the matter was contrary, still they ought not to regard that, but ought to weigh in their consciences what themselves would have done upon the same strong evidence as the first jury did; for *homines sunt mendaces et non angeli*," etc. In 1593,[1] the attaint jury gave a special verdict.[2] The defendant in a *qui tam* action had been charged with buying cattle out of market, viz., of one Pearepoint. On a plea of not guilty the jury below had found for the defendant. On attaint, the twenty-four in their special verdict set forth that the petit jury had the evidence of one Whitworth that the defendant bought of him, out of market, the cattle of Pearepoint. The attaint jury finds that the cattle were really bought of Whitworth as Whitworth's cattle; but this was not given in evidence, and they ask the Court's judgment as to the law. The Court holds against the attaint; since the jury finds that the evidence below was false in part, the first jury might properly enough disbelieve it all.

(*g.*) Of course it must be remembered that there were other grounds for punishing juries, and other grounds for giving new trials. The Court always held towards the jury a relation of control, and the books are full of traces of ordinary discipline. In an early case[3] the jury appeared to be answering subtly, so as to conceal something. The judge calls for a better answer, or he will shut them up over night. If the jurors took out food with them, or violated any of the ordinary rules, they were always subject to punishment; and in such cases new trials were granted.[4]

[1] Queen *v.* Ingersall, Cro. El. 309.

[2] A proceeding formerly said not to be good, but sustained in 1561; Burnham *v.* Heyman, Dyer, 173.

[3] In 1293 (Y. B. 21 and 22 Edw, I. 273) in an assise of mortdancestor, a tenant set up the existence of an older heir, William, and an alienation by him. The jury found that this William entered as oldest son and heir, and as next heir. "Roubury [J.] How say you that he is next heir? The Assise. Because he was born and begotten of the same father and the same mother, and his father on his death-bed acknowledged that he was his son and his heir. Roubury [J.] You shall tell us in another fashion how he is next heir, or stay shut up, without food and drink, till to-morrow morning. And then they said that he was born before the ceremony [of marriage] and after the betrothal." This, at common law, made him a bastard.

[4] "There are instances in the Year Books of the reigns of Edward III. Henry IV. and Henry VII. of judgments being stayed (even after a trial at bar), and new *venires* awarded, because the jury had eat and drank without consent of the Judge, and because the plaintiff had privately given a paper to a juryman before he was sworn." Bl. Com. iii. 387–8).

Not a few statutes also were passed, especially in the fourteenth century, giving actions or criminal process against jurymen receiving bribes and taking part in embracery. Of other less obvious but extremely important modes of controlling the jury and their consequences, I have spoken before,[1] and need not now repeat.

(*h.*) It will have been noticed, perhaps, that we find nothing of the attaint for a false verdict in criminal cases. At the beginning we saw that there was no assise, *i. e.*, no statutory jury, in such cases, and it seems to have been only in assises that the attaint was first allowed. The jury in criminal cases came in gradually, and by way of the consent of the accused, willing or forced. (*ante*, p. 265, *et seq.*) The doctrine, in all cases where one had consented, was that such party could not have the attaint, for this would be *facere probationem suam nullam.* (Bracton, 209*b*). The King, however, it was said, might have the attaint if the case went against him. Bracton (*ibid.*) tells us this, and four hundred years later we read it in Sir M. Hale.[2] But the silence of the books as regards actual cases of the exercise of this power in criminal cases may lead us to some doubt about it. The words of Bracton are satisfied by such cases as those relating to the King's revenues, and such as the *qui tam* action of 1593 (*ante*, p. 376). As regards appeals, the common law mode of trial was by battle. It is, perhaps, reason enough for denying the attaint to the plaintiff in an appeal, that historically the battle was a final thing, and here, as in the grand assise, whatever trial took the place of it partook of this character.[3] One other remark may be made as regards

[1] "Law and Fact in Jury Trials," 4 Har. Law Rev. 159–169.

[2] P. C. ii. 310 (written 1660–1676), citing Fitz. Attaint, 60: s. c. ib. 64; but this is contemporaneously denied by Vaughan, C. J., in Bushel's Case (Vaughan, 146), in 1670; "For there is no case in all the law of such an attaint, nor opinion, but that of Thirning's, 10 H. IV. . . . for which there is no warrant in law, though there is other specious authority against it." What Thirning, C. J. (Vaughan's predecessor at the head of the Common Bench), is shortly reported to have said, in 1409, is this: "One indicted of trespass and found guilty by the other inquest shall not have attaint nor a petition in the nature of attaint, because in a way (*en maner*) twenty-four have given the verdict (*i.e.*, two juries), and the two verdicts agree; but if he be acquitted the King shall have attaint by prerogative." This reason, as to two verdicts, was probably invented (although one sees it in the Year Books), and not the true historical reason.

[3] And the attaint was not extended by statute to appeals. In 1347–8 (Lib. Ass. 102, 82), in an appeal of mayhem, "Thorpe [J.], said that the defendant should never have attaint in an appeal of mayhem, any more than in a felony; for the statute gives attaint only in a writ of trespass and a bill of trespass." Not only, then, was it true, as Britton said (f. 49), that, "for avoiding the perilous risk of battle, it is better to proceed by our writs of trespass, than by appeals," but one got the benefit of the attaint in that way.

all criminal cases. Always scope was allowed to the sentiment that there should be mercy and caution in such cases. We read in a report of 1302 (Y. B. 30 and 31 Edw. I. 538,) *Et hoc nota quod melius est nocentem relinquere impunitum quam innocentem punire;*[1] and so Fortescue (*De Laudibus*, c. 27): "Truly I would rather that twenty guilty men should escape through pity than that one just man should be unjustly condemned;" in this chapter he celebrates the felicity of the English in having so many safeguards against injustice in criminal trials. But even in England the King, in criminal cases, was no mere ordinary party to an action; the procedure was heavily weighted in his favor. In treason and felony the accused could not have counsel; later, when witnesses could be had for the King, he could not have them; and still later, when he also could have them, his witnesses could not be sworn; The King, therefore, had small need of the attaint in criminal cases; and the doctrine was ancient that one should not be twice put in jeopardy for the same offence.

How then were juries kept in check in such cases? Probably the influence of the crown was sufficiently strong to prevent much injustice as against the prosecution. On the other side, the natural sympathy of the jury with accused persons, and the operation of humane maxims and sentiments, secured a tolerable fairness. And, no doubt, the judges disciplined the jury in one way or another. An early instance of this, in 1302, is found in Y. B. 30 and 31 Edw. I. 522. One was indicted for homicide and proved that he had been previously acquitted of the same death; it was found by the rolls that it was as he said, and that he had the King's writ *de bono et malo*. It was adjudged that he should go quit, and that five of the [indicting] inquest should go to prison as "attainted," and that the viscount should take their lands and chattels into the King's hands. Berewyk, J., goes on to make some remarks which appear to mean (the text seems corrupt) that while these men cannot be attained (*i.e.*, convicted) by a jury of twenty-four, yet they are attained out of their own mouths, for they were on the inquest which formerly acquitted this man of the death, and now on a jury which accuses him of it. It is added by the reporter that the justices were the harder on them because they couldn't suggest any one else as guilty. So, in 1329 (Fitz. Cor. 287), a jury was amerced for undervaluing certain goods.

[1] From the Digest, 48, 19, 5: *Divus Traianus . . . rescripsit, satius enim esse impunitum relinqui*, etc.

When the criminal jury came to hear the evidence of witnesses, this method of punishing them seemed hardly less out of place that the attaint in civil cases. It could not last, but it was hard to give it up. In 1500, for refusing to convict on what was regarded as sufficient evidence, the jury were imprisoned until they gave a bond to appear before the King and Council, and were then fined eight pounds apiece, but Sir Richard Empson was afterwards punished for this.[1] The fining and imprisonment of jurors had, indeed, been authorized by the statute 26 H. VIII. c. 4, but only in a particular place, *viz.*, in "Wales and the Marches thereof." Certain irregularities in those parts were recited, and these punishments were authorized in case of acquittal or giving "an untrue verdict against the King, contrary to good and pregnant evidence ministered to them by persons sworn before the justices," etc. Vaughan, in Bushel's case, draws the inference from this statute that this treatment would not be legal without it, or where it did not extend. But the Star Chamber accounted it legal enough for them. "In the reigns of H. VII. H. VIII Queen Mary, and the beginning of Queen Elizabeth's reign," says Hudson in his Treatise on the Star Chamber (s. vii.), "there was scarce one term pretermitted but some grand inquest or jury was fined for acquitting felons or murderers; in which case lay no attaint." In Throckmorton's case, in 1554,[2] the jury acquitted the accused of treason after his vigorous and shrewd defence of himself. "The Court being dissatisfied with the verdict, committed the jury to prison. Four of them afterwards made their submission, and owned their offence . . . and were delivered; . . . but the other eight were detained . . . and on the 26th of October [the trial was on April 17] were brought before the Council in the Star Chamber. The Lords, extremely offended at their behavior," sentenced the foreman and another to pay £2,000 apiece within a fortnight, and the other six a thousand marks each, and all were sent back to prison. On December 12, five jurors were discharged on paying £220 apiece, and nine days later the rest on paying £60 apiece.

We may see how the whole matter was regarded by a sagacious and well-informed statesman, only ten or eleven years after Throckmorton's case, in Smith's Commonwealth of England (Book III.

[1] Hardres, 98–9.

[2] How. St. Tr. 869; s. c. 1 Jardine's Crim. Trials, 62.

c. 1). If, he says, a jury improperly find a man guilty, the judges moderate this by reprieving and recommending a pardon. "If, having pregnant evidence, nevertheless, the twelve do acquit the malefactor, which they will do sometime, . . . the prisoner escapeth, but the twelve not only rebuked by the judges, but also threatened of punishment. . . . But this threatening chanceth oftener than the execution thereof. Yet I have seen in my time, but not in the reign of the queen now,[1] that an inquest for pronouncing one not guilty of treason contrary to such evidence as was brought in, were not only imprisoned for a space, but an huge fine set upon their heads; . . . another inquest for acquitting another, beside paying a fine of money, put to open ignominy and shame. But these doings were even then by many accounted very violent, tyrannical, and contrary to the liberty and custom of the realm of England. Wherefore it cometh very seldom in use; yet so much at a time the inquest may be corrupted that the prince may have cause with justice to punish them, for they are men and subject to corruption and partiality as others be."

We are told (Moore, 730–1) of many precedents in the Court of Wards for punishing juries who refused to find as directed by the Courts, and the reporter specifies five of them running from 1571 down to 1597, "this Easter term 39 Eliz." In 1600,[2] in an appeal of death, the foreman and seven others of the jury were heavily fined, but there was here an element of real misconduct, besides going against the instructions of the Court. In 1602,[3] for acquitting of murder, the jury were "committed and fined and bound to their good behavior," and the reporter does not omit to mention that Popham, Gawdy, and Fenner (the judges) *fuerunt valde irati.* In 1664,[4] six of a jury were fined for refusing "to find certain Quakers guilty according to their evidence." In 1665,[5] we are told that the twelve were fined one hundred marks apiece for acquitting certain persons of unlawfully attending conventicles. Hale (P. C. ii. 312) makes it five marks apiece, and states that "it was agreed by all the judges of England (one only dissenting) that this fine was not legally

[1] He was writing in Elizabeth's seventh year. Throckmorton's trial was in Queen Mary's first year.

[2] Watts *v.* Braines, Cro. El. 778.

[3] Wharton's Case, Yelverton 243, s. c. Noy, 48.

[4] Leach's Case, T. Raymond, 98.

[5] Wagstaffe's Case, Hardres, 409; s. c. 1 Sid. 272.

set upon the jury, for they are the judges of matters of fact, and although it was inserted in the fine that it was *contra directionem curiæ in materia legis*, this mended not the matter, for it was impossible any matter of law could come in question till the matters of fact were settled, and stated, and agreed by the jury, and of such matters of fact they were the only competent judges."[1] This appears not to have been an actual decision, for the thing continued. The dissenting judge was probably Kelyng. Had the judges met a little earlier there would have been another dissenter, *viz.*, Chief Justice Hyde, who died on the first of the same May wherein Wagstaffe was punished. What his opinions were may be seen in a civil case just before, on "Friday, April 14" (1 Keble, 864), where in arranging for a new trial in a case where a verdict had been given contrary to evidence, he "ordered the sheriff should return a good jury in the new trial;" and the reporter adds, "Hyde, Chief Justice, conceived jurors ought to be fined if they would go against the Hare [law?] and direction, take bit in mouth and go headstrong against the Court; and said, that by the grace of God he would have it tried, seeing the attaint is now fruitless." The ardor of these expressions may be understood from what this same judge had done before, and the reception his action had met with. He had, in fact, in a civil case, fined the jurors five pounds apiece three years before, but the exchequer judges had refused to enforce the fine as being illegal, and "the greater part of the rest of the judges" had agreed with them.[2] The doctrine that wherever an attaint will lie upon a verdict (*i.e.*, in all civil cases, at any rate) it is illegal to fine or imprison, is laid down in Bushel's Case in 1670,[3] and is referred to the case where Hyde had fined the jury "All the judges have agreed upon a full conference at Serjeant's Inn in this case. And it was formerly so agreed by the then judges in a case where Justice Hyde, etc., . . . that a jury is not finable for going against their evidence where an attaint lies . . . for it may be affirmed and found upon the attaint a true verdict."

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[1] Hale's book is supposed to have been written in 1660–1676. It was not printed for sixty years after his death.

[2] Hale, P. C. ii. 160, 311. Certain distinctions between the authority of different judges and different courts, I do not consider; see Hale, P. C. ii. 310–13.

[3] Vaughan, pp. 144–5.

In criminal cases, fining was still kept up. In 1666 (Kelyng, 50) Kelyng, the new Chief Justice, fined a jury five pounds apiece for a verdict of manslaughter where he had directed them that it was murder; "but after, upon the petition of the jurors, I took down their fines to 40 s. apiece, which they all paid." In 1667,[1] Kelyng fined eleven of the grand jury 20 pounds apiece for refusing to indict for murder, and the Judges of the King's Bench held this good. The reporter makes the judges add, "And when the petty jury, contrary to directions of the Court, will find a murder manslaughter . . . yet the Court will fine them. But," adds the reporter, "because they were gentlemen of repute in the country, the Court spared the fine; yet in Parliament the Chief Justice was fain to submit, being by Sir H. W[indham] accused."[2] And finally at the old Bailey, in 1670, the jurors who acquitted William Penn and William Mead on a charge of taking part in an unlawful assembly, etc., were fined and imprisoned. But on habeas corpus in the Common Pleas,[3] they were discharged, and Vaughan, C.J., pronounced that memorable opinion which ended the fining of jurors for their verdicts, and vindicated their character as judges of fact. "A witness," he says, "swears to but what he hath heard or seen; generally or more largely to what hath fallen under his senses. But a juryman swears to what he can infer and conclude from the testimony of such witnesses by the act and force of his understanding to be the fact inquired after."[4] As regards the charge that the jury went against the instruction of the Court in law,—a court, Vaughan says, does not charge a jury with matter of law in the abstract, but only upon the law as growing out of some supposition of fact. This matter of fact is for the jury; it is not for the judge, "having heard the evidence given in court (for he knows no other)," to order the jury to find the

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[1] King *v.* Windham, 2 Keble, 180.

[2] For the proceedings in the House of Commons see 6 How. State Trials, 993. The House appears to have passed a resolution (after hearing the Chief Justice in his own defence) condemning the fining or imprisoning of jurors as illegal. But a bill which was brought in to the same effect did not pass the House.

[3] Bushel's case, Vaughan, 135. S.C. 6 How. St. Tr. 999; for Penn and Mead's Case see ib. 951. Vaughan's opinion, as it has come down to us, is evidently in the form of an unfinished draft.

[4] "A verdict," says Lee, C. J., in 1738 (Smith d. Dormer *v.* Parkhurst, Andrews, 322), "is only a judgment given upon a comparison of proofs." When we read that, we are aware of a wholly modern atmosphere.

fact one way rather than the other; for if he could, "the jury is but a troublesome delay, great charge, and of no use." The judge cannot know all the evidence which the jury goes upon; they have much other than what is given in court. They are from the vicinage, because the law supposes them to be able to decide the case though no evidence at all were given in court on either side. They may, from their private knowledge of which the judge knows nothing, have ground to discredit all that is given in evidence in court. They may proceed upon a view.[1] "A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning." It is absurd that a judge should fine a jury for going against their evidence, when he knows but part of it, "for the better and greater part of the evidence may be wholly unknown to him; and this may happen in most cases, and often doth, as in Grandby and Short's Case."[2]

(*i.*) Two things stand out prominently in Vaughan's opinion in Bushel's Case: 1. The jury are judges of evidence. 2. *They act upon evidence of which the Court knows nothing;* and may rightfully decide a case without any evidence publicly given for or against either party. It was now two hundred years since Fortescue wrote his book and showed witnesses testifying in open court to the jury; and as we see, not yet has the jury lost its old character, as being in itself a body of witnesses; indeed, it is this character, and this fact that the judge cannot know the evi-

[1] For the modern way of dealing with this matter of the view see Tully *v.* Fitchburg R. R. Co., 134 Mass. 499, 503. As regards difficulties that some courts have felt in harmonizing the function of the court in setting aside verdicts, with that of the jury in acting upon a view and in dealing with the evidence of experts, see Topeka *v.* Martineau, 42 Kansas, pp. 389–91; Hoffman *v.* R. R. Co., 22 Atl. Rep. p. 826; Parks *v.* Boston, 15 Pick. pp. 209–11, and the excellent remarks of Shaw, C. J., in Davis *v.* Jenney, 1 Met. pp. 222–3

[2] Cro. El. 616 (1598). Bushel's Case marks the end of the whole anachronism of punishing jurors for their verdicts as being against evidence; for, although the attaint was not abolished until 1825, it was but a name. Yet Vaughan's successor, Sir Francis North, afterwards Lord Keeper, did not at all like this result. In that delightful book, "The Life of the Lord Keeper Guilford," his brother, Roger North (i. p. 131), preserves a remark by the Lord Keeper that the doctrine "that juries cannot be fined for slighting evidence and directions [is] contrary to reason and the whole course of precedents." Roger North adds, "This was popular, and the law stands so settled. The matter is trust, whether the Court or jury. The Court may abuse a trust in an undue punishment of jurymen, as in any other acts of justice; and on the other side, juries may abuse their trust . . . The precedents run all for the trust on the side of the Court; what reason to change it (which was changing the law) but popularity."

dence upon which they go, that make one of the chief pillars upon which Vaughan's great judgment rests. This double character of the jury was no novelty. As we have seen, the jury had much evidence long before the parties could bring in their witnesses, and in so far as they acted on evidence they were always judges. This side of their function had been slowly growing, until now it was a great, conspicuous thing. But the old one had not gone; that also continued a great and leading part of their function. Yet it had begun to diminish, and by the end of another century it would be mainly gone.

(*j.*) As things stood after Bushel's Case, how should the jury be controlled? The attaint was obsolete, and fining and imprisonment were no longer possible. In no way could they be punished for giving verdicts against law or evidence. The courts found a remedy in their very ancient jurisdiction of granting new trials in case of misconduct. If a jury should accept food from one of the parties while they were out, or should take from him a paper not delivered to them in court, and should afterwards find for him, the court would refuse judgment, and grant a new *venire*. Why not, then, if the jury should go plainly counter to law, or should give an irrational, absurd, or clearly false verdict, do the same thing? This was done. It was hazardous, for it was, in some cases, undertaking to revise the action of the jury in a region belonging peculiarly to them, and was going beyond anything that had formerly been done. Moreover, how should the court know that the jury's verdict was against evidence? And how should they know what the law was until they knew what the facts were, since the law, as applicable to the case, was inextricably bound up with some definite supposition of fact? Evidently the keen arguments of Vaughan's opinion were applicable also to the granting of new trials, for going against law and evidence. But the step had been taken at least as early as the first half of the seventeenth century.

In order to make it effective it was necessary to accompany this practice by an endeavor to make the jury declare publicly their private knowledge about the cause. This effort prospered but slowly. The old function of the jury was too deeply ingrained to give way in any short time; the judges long contented themselves with advice, with laying it down as a moral duty that the jury should publicly declare what they knew. But while the jury's right to go upon their private knowledge was emphatically recog-

nized in 1670, and continued to be allowed in the books well on into the next century, yet the enlarged practice in granting new trials, and the growth and development of it in the seventeenth and eighteenth centuries, was steadily transforming the old jury into the modern one; and at last it was possible for the judges to lay it down for law that a jury cannot give a verdict upon their private knowledge.[1]

(*k.*) Let me now run over a few of the cases relating to the new way of controlling the jury. The first reported case of the modern new trial is said (I suppose truly) to be that of Wood *v.* Gunston in 1655 in the "Upper Bench" (Style, 462). The jury, in an action for calling a man a traitor, had given fifteen hundred pounds damages; a motion was made to set this aside as excessive, and give a new trial. It was granted after full debate; Glynne, C.J., saying, "If the Court do believe that the jury gave a verdict against their direction they may grant a new trial." It is probable, although this is the first case that got reported of allowing a new trial for the modern reasons, that it was not the first decided. Indeed, Holt, C.J., in 1699, says, in Argent *v.* Sir Marmaduke Darrell (Salk. 648), where a new trial was moved for in a trial at bar, on the ground that the verdict was against evidence:

"The reason of granting new trials upon verdicts against evidence at the assises is because they are subordinate trials appointed by the Statute West. II. c. 30. . . . And there have been new trials anciently, as appears from this, that it is a good challenge to the juror that he hath been a juror before in the same cause. But we must not make ourselves absolute judges of law and fact too; and there never was a new trial after a trial at bar, in ejectment," etc. And Lord Mansfield, in the valuable case of Bright *v.* Eynon 1 Burrow, 390 (1757), said: "It is not true 'that no new trials were granted before 1655;' as has been said from Style, 466." He was referring, apparently, to the argument of Serjeant Maynard,

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1 "It remained," says Mr. Pike (Hist. Crime, ii. 368–9), "for Lord Ellenborough, in the year 1816, to lay clearly down the maxim that a judge who should tell jurors to consider as evidence their own acquaintance with matters in dispute would misdirect them. The true qualification for a juror has thus become exactly the reverse of that which it was when juries were first instituted. In order to give an impartial verdict, he should enter the box altogether uniformed on the issue which he will have to decide." Perhaps the effect of this case, which I take to be R. *v.* Sutton, 4 M. & S. 532, is overstated here. But this, at least, is true, that the Court here *assumes* the truth of this doctrine. See 3 Har. Law Rev. 300; McKinnon *v.* Bliss, 21 N. Y. p. 215.

in that case (Wood *v.* Gunston), who "said that after a verdict the partiality of the jury ought not to be questioned, nor is there any precedent for it in our books of the law." Lord Mansfield added (p. 394): "The reason why this matter cannot be traced farther back is, 'that the old Report Books do not give any accounts of determinations made by the court upon motions.'" In support of what he says, Lord Mansfield relies on the language of Glynne, C.J., in Wood *v.* Gunston: "It is frequent in our Books for the Court to take notice of miscarriages of juries and to grant new trials upon them." But it seems true that the change came about not long before Wood *v.* Gunston. In 1648 in Slade's Case (Style, 138), judgment had been stayed upon a verdict, on a certificate from the judge presiding at the trial, who certified that "the verdict passed against his opinion." A motion was now made for judgment; but "Hales of counsel with the defendant prayed that this judgment might be arrested, and that there might be a new trial, for that it hath been done heretofore in like cases."[1] Roll, J., "It ought not to be stayed, though it have been done in the Common Pleas, for it was too arbitrary for them to do it, and you may have your attaint against the jury, and there is no other remedy in law for you, but it were good to advise the party to suffer a new trial for better satisfaction." We may take it, then that in the early part of the seventeenth century the practice of supervising the verdicts of juries, much as it is now done, was introduced, or, at any rate, clearly recognized and established.[2]

Now, as I have said, in order to enforce effectually the granting of new trials, it was important that the jury should disclose publicly what they knew, so that the Court could tell whether they really did go against evidence or not. The Courts acted accordingly. In 1650, in Bennett *v.* Hartford (Style, 233), it was laid down that a juror ought to state publicly in court on oath any information that he has, and not to give it in private to his companions. In 1656,[3] a barrister being returned of the jury, and "having been

[1] Hales is probably Sir M. Hale, who was so called, and was then a leading barrister.

[2] A very interesting fact should be noted here, that the Common Law Courts were not only stirred up to granting new triais by the obsolescence of attaints, and the need of controlling juries, but by the interference of Courts of Equity. In Martyn *v.* Jackson (1674), on the motion to set aside a verdict on the parol affirmation of Hale, C.J., that it was against evidence, Twisden, J., and Wilde, J., refused a new trial. Rainsford, C.J., was for it: "Juries are wilful enough, and denying a new trial here will but send parties into the Chancery."

[3] Duke *v.* Ventris, a trial at bar, Trials per Pais, c. 12 (8th ed. p. 258).

at a trial of the same cause about twenty years past, in the exchequer, and heard there great evidence," asked whether he ought to inform the rest of the jury privately of this, or conceal it, or declare it in open court. The Court ordered him to make public declaration of it. He did so, and upon merely his juryman's oath. Half a century later, in 1702,[1] the same duty is reported as having been laid down in general terms for the whole jury: "If a jury give a verdict on their own knowledge, they ought to tell the Court so, that they may be sworn as witnesses. And the fair way is to tell the Court before they are sworn that they have evidence to give."

We have now traced the old attaint to its end, and have brought out its modern substitute. During the last two or three centuries many interesting things grew out of the changes in the jury. The statutes of the sixteenth and seventeenth centuries, requiring two accusers and two witnesses in certain cases, were a limitation upon the power of the jury; before, they need have no witnesses at all. The process of laying down rules of presumption and fixing upon evidence a conclusive quality,—always an incident of judicature,—was yet immensely stimulated by the jury. A legislative illustration of this is seen in the "Statute of Stabbing" (1 Jac. 1, c. 8), in 1603, fixing upon certain acts the quality of malice aforethought, "although it cannot be proved;" a law made, as the judges declared in 1666, in Lord Morley's Case (Kelyng, 55), "to prevent the inconveniences of juries, who were apt to believe that to be a provocation to extenuate a murder which in law is not." There is reason to surmise that a leading motive in the enactment of that singular and very un-English piece of legislation, the Statute of Frauds, was found in the uncertainty that hung over everything at a period when the law of proof was so unsettled. It will be remembered that it was then a very critical time; that the attaint as an operative thing had vanished, while the law of new trials was in its tender infancy, and the rules of our present law of evidence but little developed.[2]

But the greatest and most characteristic offshoot of the jury was that body of excluding rules which chiefly constitutes the English "Law of Evidence." If we imagine what would have

[1] Powys *v.* Gould, 7 Mod. 1, s. c. anonymous, Salk. 405, Holt, 404.

[2] See Harv. Law Rev. iv. 91.

happened if the petit jury had kept up the older methods of procedure, as the grand jury in criminal cases did, and does at the present day,[1] — if, instead of hearing witnesses publicly, under the eye of the judge, it had heard them privately and without any judicial supervision, it is easy to see that our law of evidence never would have grown up. This it is,—this judicial oversight and control of the process of introducing evidence to the jury, that gave it birth; and he who would understand it must keep this fact constantly in mind.

James B. Thayer.

CAMBRIDGE.

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[1] Two centuries ago the grand jury came near losing its ancient procedure. In Shaftesbury's Case, 8 How., St. Tr. 759 (1681), they were in fact compelled to receive their evidence publicly in court. But the vigorous protests of the jury and the fruitless outcome of the attempt led to an abandonment of it.